

# Legal and Doctrine Perspectives on Judicial Mediation Within a Corporation

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**Abstract:** This article aims to discuss corporate judicial mediation, shedding light on the relevance of this subject. As conflicts within a company can potentially lead to financial collapse if not resolved timely and even render it impossible to sustain business operations, mediation is a crucial tool for sustaining business operations. Mediation, whether judicial or extrajudicial, began in Brazil in the 1990s. It is a practice aligned with the American multidoor system coined as the MultidoorCourthouseSystem by Sander, meaning that there are several doors for conflict resolution. In the mediation sessions—which rarely occur just once—the parties must be assisted by their lawyers or public defenders. The mediator plays a central role as a facilitator, fostering communication and bringing the parties together. It's important to note that the mediator does not decide or propose solutions but acts as a neutral guide in the process. Within our legal framework, judicial mediations, whether involving companies or not, occur in judicial centers for conflict resolution and citizenship called *Centros Judiciários de Solução de Conflitos e Cidadania* – CEJUSCS or within the court system. Principles govern this matter, emphasizing, among others, the autonomy of the parties' will, informality, confidentiality, the impartiality of the mediator, the isonomy of the parties, orality, the search for consensus and good faith (Mediation Law, Art. 2, Items I to VIII). Confidentiality and speed are features present in business and other mediation.

**Keywords:** Company, Conflict, Consensus, Judicial Mediation, Resolution

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## 1. Introduction

This paper aims to discuss the subject of Judicial Mediation and its application in the business context—a voluntary means for conflict resolution that can be prevalent within companies.

In this context, the parties are not considered adversaries, as is often the case in traditional judicial processes.

Brazilian law has incorporated insights from North American legal traditions, notably those from Harvard Law School under the guidance of Professor Frank Sander.

The scope of this subject is restricted to our territory, where three laws specifically address it: Resolution of the *Conselho Nacional de Justiça* under No. 125/2010, and *Código de Processo Civil* – Law No. 13105/2015 and *Lei da Mediação* No. 13140/2015.

Numerous works have been written on the subject, yet when it comes to business mediation, the bibliography is notably sparse on this subject.

The selection of the subject is tied to its practical utility, guiding mediation through ethical principles, with a particular emphasis on the autonomy of the will. Legal requirements mandate the training of mediators, even when parties are accompanied by lawyers.

The deductive method is employed here, using bibliographical research and drawing upon the doctrine of national authors, some of whom have been inspired by North American perspectives, along with relevant legislation.

It is important to remember that this work does not aim to provide an exhaustive analysis of the subject.

The article is organized into the following sections: a) Abstract; b) Introduction; c) Concept and Principles; d) Co-mediation; e) Business Mediation – General Aspects; f) Role of the Mediator; g) Conclusions; h) References.

## 2. Mediation– Concept and Principles

The Brazilian Mediation Law 13140/2015 defines the

concept in Article 1, sole paragraph, as follows: “Mediation is considered a technical activity carried out by an impartial third party without decision-making power, who, chosen or accepted by the parties, assists and encourages them to identify or develop consensual solutions to the dispute.[...]”. [1]

Two additional laws address the subject: Resolution No. 125/2010 from the National Council of Justice [2] and the Code of Civil Procedure No. 13105/2015 (the latter devoting an entire section—Section V). [3]

While mediation and conciliation are not new concepts in the country, the former, in its present form, has been employed since the 1990s. The pursuit of the latter predates this period.

In the context of companies, mediation finds broad applicability as it encompasses rights available, thereby facilitating transactions.

This process is best conducted in an informal setting, using easily understandable language. The mediator serves as the guide in the mediation process. Essential training mandates a minimum of two years since graduation from a higher education course—not necessarily in law—at an institution recognized by the Ministry of Education. This recognition can be through a school or institution that trains mediators, acknowledged by either the courts or the (Escola Nacional de Formação e Aperfeiçoamento de Magistrados – ENFAM). [4] Additionally, the mediator must demonstrate capability. Upon fulfilling these requirements, individuals are eligible for registration on the court mediator roster.

Article 12 of the Lei de Mediação (Mediation Law) stipulates that ‘the courts will establish and maintain updated registries of qualified and authorized mediators for judicial mediation.’

Centros Judiciários de Solução de Conflitos e Cidadania – CEJUSCs focused on business are under development in Brazil. [5]

Mediation is guided by several principles, including, but not limited to: the autonomy of the parties’ will, equality between them, the pursuit of consensus, informality, the mediator’s impartiality, and good faith.

Mediation is a voluntary process, and no one will be compelled to undergo it, as per Article 2, Section 2 of the Mediation Law.

### **2.1. Co-Mediation**

This mediation procedure involves the collaboration of multiple mediators,

a recommended approach given the complexity or nature of the conflict [6].

This occurs for a few reasons: 1. It allows the skills and experience of two or more mediators to collaborate in achieving the goals of mediation, including dispute resolution; 2. It provides mediators with diverse cultural profiles or genders; 3. Facilitates the supervised training of apprentice mediators [7].

Co-mediation may take place in mediations involving business disputes where both legal and economic issues are discussed simultaneously. In the first case, a professional with

a legal background would be used, and in the second case, a professional with a background in economics would be involved. [8]

A cross-disciplinary team, bringing together professionals from various areas, enhances the understanding of conflicts, thereby smoothing the path to reaching a solution.

### **2.2. Corporate Judicial Mediation – General Concepts**

Business mediation refers to the resolution process that takes place either within a company or between different companies [9].

Conflicts within a company, as well as external disputes, can make the corporate scene quite challenging. In some instances, especially when it involves a competing company, the chosen method for resolution is known as inter-organizational mediation. Between these entities, there are past relationships marked by a significant bond.

Business conflicts, even if minor, can lead to consequences that may pose obstacles to the overall development of the business organization. Effectively managing this state of affairs is a crucial aspect that must be approached rationally; otherwise, it has the potential to lead to the company's downfall [10].

It's crucial to note that mediation, aimed at resolving business-related conflicts, can be formalized between companies and organizations, companies and institutions, or even corporations, among other sectors. In this case, mediation is justified, and, when well-executed, it can project a future fostering of harmonious coexistence.

The concept under study, whether within the business sector or beyond, aims not solely for agreement; in cases where agreement isn't reached, achieving pacification among the parties is still considered progress.

In the event of a dispute arising, such as between business groups, mediation provides room for the pacification of conflicts, particularly aiming for solutions that bring reciprocal benefits, diverging from adjudicated resolutions. [11] At the core of the entire self-composing system lies the foundation of dialogue.

It is worth noting that a common practice reveals that many disputes arise from non-compliance with contractual clauses in the business environment. It might even occur that, as a result of the conducted mediation, a new company emerges.

The mediator, who also happens to be the actor directing the mediation, plays a pivotal role. This is especially evident in business conflicts where parties tend to articulate proposals with a more specific and objective bias. In the legal domain, the mediator's significance becomes even more relevant. [12]

Business mediation isn't isolated; instead, it's an integral part of conflict mediation at large, as highlighted earlier. Its significance extends beyond individual disputes, playing a crucial role in managing intersubjective controversies and regulating society, fostering a culture of peace through the practice of non-violent communication. [13]

Among its various advantages, this form of mediation stands out for its ability to save time and elevate procedural agility. [14]

### Mediator's Performance

As the main actor in mediation, success in negotiation hinges on their attitudes.

In fulfilling the role of a business mediator, they guide through corporate controversies, contracts, dissolutions, conflicts between employees and supporters, franchises, judicial recoveries, and more. Their task is to assist interested parties in understanding the issues and conflicting interests, ultimately facilitating dialogue. While maintaining a comprehensive perspective, it is advisable to seek insights from various domains of knowledge.

A mediator must embody neutrality, training, flexibility, intelligence, patience, empathy, sensitivity, imagination, energy, persuasion, objectivity, and a touch of humor, all while being trustworthy to perform the role. [15]

The mediator plays various roles: presiding over conversations and ensuring their confidentiality; guiding and informing the parties; managing interactions, controlling time, tone, and accuracy; translating communications and confirming understanding among those involved; encouraging the reassessment of expectations and analysis of conflicts, including access to privileged information or aggression between the parties. [16] Importantly, this actor does not possess judicial powers.

Regarding mediators and the human resources engaged in mediation, the United States stands as a valuable reference, as noted by Michelle T. Barbado. This is credited to 'the high degree of organization of entities, both public and private, for fundraising, investment in research, and training of highly qualified professionals.' [17] The self-compositional methods that originated in the United States of America are a testament to innovation. [18] In contrast to a conciliator, a mediator doesn't dictate conflict resolutions but guides parties in uncovering the roots of their issues. [19]

## 3. Conclusions

Alternative means of resolving conflicts, such as ADRs, a subset of the self-composition genre, proceed faster and at a lower cost compared to the adjudicated process decided by a judge.

The means employed here, Judicial Mediation, boasts additional advantages, with notable highlights being procedural flexibility, informality, and a dedicated pursuit of conflict resolution in a conscious and informed manner.

The mediator, required to undergo training, engages in mediation, whether in business or other contexts, with a preference for cases where a pre-existing connection exists between the parties. In every instance, the mediator must consistently strive to preserve the relationship between them.

The demand for corporate judicial mediation in the country has been on the rise, particularly following the enactment of the following laws: No. 13,105/2015 (*Código de Processo Civil*); No. 13140/2015 (*Lei da Mediação*) and No. 125/2010 (*Resolução do Conselho Nacional de Justiça*). With even more reason to anticipate growth, the *Centros Judiciários de Solução de Conflitos e Cidadania* – CEJUSCs were

established, with some already operational.

## Conflicts of Interest

The authors declare no conflicts of interest.

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